No. 83-1947

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,

Petitioner,

v.

CHARLES NOEL WOODWARD,

Respondent.

BRIEF IN OPPOSITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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CERTIFICATE

OF

SERVICE

I am a resident of the County fo Los Angeles, California; I am over the age of eighteen years and not a party to the above-captioned action; my business address is 1939 Rose Ville Street, Pasadena, California 91107.

On September 13, 1984, I placed the Brief in Opposition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit on the petitioner, Solicitor General of the United States, by placing a true copy thereof in a sealed envelope with postage fully prepaid, in the United States mail at Pasadena, California addressed as follows:

Solicitor General of the United States
United States Department of Justice
Washington, D.C. 20530

I declare the foregoing to be true and correct, under penalty of perjury.

Terry J. Amdur

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REASONS FOR DENYING THE PETITION

I. THE ISSUE INVOLVED IN THE PRESENT CASE IS NOT SIGNIFICANT ENOUGH TO WARRANT REVIEW BY THE COURT.

The questions involved in the instant case is whether 18 U.S.C. 1001 constitutes a lesser included offense within 31 U.S.C. 1058. The panel in the Ninth Circuit concluded that where the same conduct is punishable under both 18 U.S.C. 1001 and 31 U.S.C. 1058, it can be punished under either statute but not under both.

In Albernaz v. United States, 450 U.S. 333 (1981) this Court sought to further define the role of the test announced in the case of Blockburger v. United States , 284 U.S. 299 (1932). This Court held in Albernaz that consecutive sentences for conspiracy to import marijuana and conspiracy to distribute marijuana do not violate the double jeopardy clause because each offense requires proof of a fact that the other does not. Albernaz, 450 U.S. at 1142. In applying the Blockburger test, this Court restated its view that the Blockburger test in one of statutory construction. Therefore, when Congress has strongly indicated its legislative intent to impose multiple punishment, the Blockburger test need not be applied. Albernaz, 450 U.S. at 1143.

The Ninth Circuit in the instant case concluded that in the absence of legislative intent calling for multiple punishment, application of the test in Blockburger required the finding that both statutes penalized the same conduct. The panel in Woodward concluded that each statute required proof of the same elements and, accordingly, the offenses merged upon application of the Blockburger test.

IT is submitted that nothing in this Court's

holding in Albernaz v. United States or Missouri v. Hunter, ___U.S.___, 103 S.Ct. 673, 679, 74 L.Ed2d 535 (1983) precludes the holding by the Ninth Circuit in Woodward. As in Whalen v. United States, 445 U.S. 684 (1980), this Court in Albernaz restated its firmly established position that the Blockburger test is appropriate where strong and clear Congressional intent is lacking concerning the imposition of multiple punishment.

Nothing in the ruling substantially departs from previously holdings of this Court. It is apparently uncontested that there is no legislative history mandating that multiple punishments were intended for violation of 18 U.S.C. and 31 U.S.C. 1058. As such, application of the Blockburger test is entirely appropriate; the quarrel, if any, would appear to be with the holding that the same elements constitute both offenses.

Nothing in the holding of United States v. Anderez, 661 F.2d 404 (5th Cir. 1981) directly conflicts with that conclusion. In Anderez, the Fifth Circuit reversed the district judge's entry of a judgment of acquittal following a jury verdict finding the defendant guilty of a violation of 18 U.S.C. 1001. In a factual situation similar to the instant case, the trial judge concluded that because Congress had determined to punish Anderez' conduct as a misdemeanor under 31 U.S.C. 1101, 1058, it did not intend to create felony liability for the same conduct under 18 U.S.C. 1001. The trial judge upheld the conviction under 31 U.S.C. 1058.

In reversing the holding of the district judge, the Fifth Circuit concluded that nothing in the legislative history indicated a Congressional intent to preclude a conviction under 18 U.S.C. 1001. While the Fifth Circuit reinstated the conviction, it did so on the basis that Congress did not

intend to preclude prosecution under the older false statement statute (18 U.S.C. 1001) by the subsequent enactment of the Reporting Act provisions of 31 U.S.C. 1058 and 1101. The Fifth Circuit concluded that "throughout the legislative history there is nothing to suggest that a violation of the Reporting Act cannot also amount to a violation of 18 U.S.C 1001." Anderez, 661 F.2d at 407.

The Fifth Circuit's holding in Anderez was predicated on its view of the legislative history; Woodward was based on the "statutory elements" test of Blockburger. Admittedly, the Anderez court rejected the applicability of Blockburger in a footnote; however, that language was dictum and unnnecessary to the holding.

As pointed out by the panel of the Ninth Circuit in Woodward, the subsequent holding of the Fifth Circuit in United States v. Hajecate, 683 F.2d 894 (5th Cir. 1982), tends to undermine the language contained in the Anderez footnote. The assumption in Anderez that a violation of 18 U.S.C. 1001 requires an affirmative misrepresentation was called into serious question by the holding in Hajecate, where that court rejected a claim that proof of a false statement is necessary under 18 U.S.C. 1001 with the statement that "[s]ection 1001 renders illegal intentional falsification and concealment, as well as false statements." Hajecate, 683 F.2d at 99.

The Anderez court apparently rejected the applicability of Blockburger because of its assumption that a violation of 18 U.S.C. 1001 required the act of affirmative misrepresentation, while a violation of 31 U.S.C. 1058 did not. The opinion of the Fifth Circuit in the later case of United States v. Hajecate would appear to reconcile that circuit's objections to the rule announced in Woodward.

The Fifth Circuit language in Hajecate would appear to harmonize that circuit's definition of the essential elements of an offense under 18 U.S.C. 1001 with that of the Ninth Circuit. See United States v. Masters, 612 F2d 1117 (9th Cir. 11 7, 1122 (9th Cir. 1979).

Petitioner questions the propriety of the Ninth Circuit's characterization of the felony charge (18 U.S.C. 1001) as a lesser included offense of the Reporting Act violation (31 U.S.C. 1058), a misdemeanor. The determination of a lesser included offense appears not to be a matter of constitutional dimension. As pointed out by petitioner in his brief, the selection of which count to vacate upon a determination of improper multiple prosecutions is discretionary with the court. (Petition, p. 24, fn. 17).

Courts differ upon how to determine which of two offenses is the lesser included offense. Some courts focus on the evidence adduced at trial, United States v. Sampol, 636 F.2d 621, 652 (D.C. Cir. 1980); others direct their inquiry to the statutory elements of the offenses involved. Government of Virgin Islands v. Bedford, 671 F.2d 758, 765 (3rd Cir. 1982).

The Ninth Circuit has maintained the practice of vacating a conviction under 18 U.S.C. 1001 where a defendant is improperly convicted of violating both 18 U.S.C. 1001 and another statute which includes all the elements of the section 1001 conviction. United States v. Rose, 570 F.2d 1358, 1363 (9th Cir. 1978). In Rose, the court vacated a conviction under 18 U.S.C. 1001 and left standing the conviction under 18 U.S.C. 542, even though conviction of that offense carried a maximum penalty of 2 years in custody, where the 18 U.S.C. 1001 carries a maximum penalty of five years in custody.

The position taken by the Ninth Circuit that 18 U.S.C. 1001 is a lesser included offense where conviction occurs in conjunction with another statute including all the elements of 18 U.S.C. 1001 has been a consistent one. In the recent case of United States v. Salinas-Ceron, 731 F.2d 1375 (9th Cir. 1984), the court upheld the dismissal of a charge of 18 U.S.C. 1001 where a conviction under 31 U.S.C. 5316(a) and 5322(a) had been obtained. 1/ Applying the principle announced in Rose-Woodward, the circuit concluded that 18 U.S.C. 1001 is a lesser included offense of 31 U.S.C. 5316(a), a misdemeanor.

Application of this principle does no violence to any constitutional principles nor does it frustrate any law enforcement objectives. As previously decided by the Ninth Circuit in United States v. Duncan, 693 F.2d 971 (9th Cir. 1982), prosecution under 18 U.S.C. 1001 is not preempted by the more specific provisions of 31 U.S.C. 1058. Therefore, one who violates the provisions of 31 U.S.C. 1058 may likewise by prosecuted under the more general false statement provisions of 18 U.S.C. 1001. The prosecutor has the option of proceeding under either charge; however, he cannot obtain

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1/ 31 U.S.C. 5316(a) provides:

Except as provided in subsection (c) of this section, a person or an agent or bailee of the person shall file a report under subsection (b) of this section when the person, agent or bailee knowlingly-

(1) transports or has transported monetary instruments or more than $5,000 at one time-

(A) from a place in the United States to or through a place outside the United States; or

(B) to a place in the United States from or through

convictions under both statutes without the doctrine of lesser included offenses coming into play. The prosecutor may have his felony conviction if he wishes; nothing in the instant case deprives him of the prosecutorial discretion to institute such a charge. More than that is neither required or justified.

II. Woodward, Rose and Salinas-Ceron are Well Considered and Should Not be Reviewed or Overturned.

The Ninth Circuit in Woodward undertook a comprehensive review of the legislative history of 18 U.S.C. 1001 and the Reporting Act statutes. Based upon that review, the court in Woodward concluded that the legislative history gave no clear indication of Congress' intention to impose double punishment under 18 U.S.C. 1001 and 31 U.S.C. 1058.

The application of the rule originally announced by the Ninth Circuit in United States v. Rose, and later expounded upon in United States v. Woodward and United States v. Salinas-Ceron, serves a valid function in protecting the defendant against multiple prosecutions.

1/ (cont.)

... a place outside the United States; or

(2) receives monetary instruments or more than $5,000 at one time transported into the United States from or through a place outside the United States.

31 U.S.C. 5322(a) provides:

A person willfully violating this subchapter or a regulation prescribed under this subchapter (except section 5315 of this title or a regulation prescribed under section 5315) shall be fined not more than $1,000, imprisoned for not more than one year, or both.

The holding in Woodward is well reasoned and permits wide prosecutorial discretion in charging of offenses while at the same time protecting the defendant against multiple prosecutions and the possibility of pyramided sentences in the absence of clear Congressional intent.

CONCLUSIONS

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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